

F.M. SIMMONS #1484569 §
v. § CIVIL ACTION NO. 6:08cv304
NICHOLE CANNON, ET AL. §

The Plaintiff F.M. Simmons, proceeding *pro se*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged denials of his constitutional rights during his confinement in the Henderson County Jail. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

After review of the pleadings, the Magistrate Judge ordered that prison officials furnish the Court with certified documents relevant to the Plaintiff's claims. A copy of these documents were sent to Simmons, who was given ample time in which to respond but did not do so. After review of the pleadings and documents, the Magistrate Judge issued a Report on April 7, 2009, recommending that the lawsuit be dismissed with prejudice as frivolous and for failure to state a claim upon which relief could be granted, and in the alternative that the case be dismissed with prejudice for failure to exhaust administrative remedies, as required by 42 U.S.C. §1997e.

A copy of the Magistrate Judge’s Report was sent to Simmons at his last known address, return receipt requested, but no objections have been received; accordingly, he is barred from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and

legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has reviewed the pleadings in this cause and the Report of the Magistrate Judge. Upon such review, the Court has determined that the Magistrate Judge's Report is correct. It is accordingly

ORDERED that the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled civil rights lawsuit be and hereby is DISMISSED with prejudice, as frivolous and for failure to state a claim upon which relief may be granted, and in the alternative for failure to exhaust administrative remedies, as Simmons conceded non-exhaustion in his original complaint.¹ It is further

ORDERED that any and all motions which may be pending in this action are hereby DENIED.

So ORDERED and SIGNED this 12th day of May, 2009.

A handwritten signature in black ink, appearing to read 'Leonard Davis', written over a horizontal line.

**LEONARD DAVIS
UNITED STATES DISTRICT JUDGE**

¹Although exhaustion of administrative remedies is normally an affirmative defense, in this case it is apparent from the face of the pleadings because Simmons conceded in his original complaint that he had not yet completed the process of exhaustion of his administrative remedies; thus, it may be raised *sua sponte*. Carbe v. Lappin, 492 F.3d 325, 328 n. 9 (5th Cir. 2007), *citing Jones v. Bock*, 127 S.Ct. 910, 920-21 (2007).